Office - Supreme Court, U.S.
FILED
APR 11 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1051

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

PAUL BENDETTI,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and on Motion for Leave to Supplement the Petition for Writ of Certiorari**

## REPLY BRIEF FOR PETITIONER

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
*Counsel for Petitioner*

April 11, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF AUTHORITIES


*Cases:* Page

*Faretta* v. *California*, 422 U.S. 806 (1975) ..... 4, 5
*Flanagan* v. *United States*, No. 82-374, *cert. granted*, 51 U.S.L.W. 3508 (U.S. Jan. 10, 1983) .. 3, 4, 5
*United States* v. *Agosto*, 675 F.2d 965 (8th Cir. 1982) ..... 4
*United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973) ..... 1, 2
*United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975) ..... 4
*United States* v. *Cunningham*, 672 F.2d 1064 (2d Cir. 1982) ..... 4
*United States* v. *Curcio*, 680 F.2d 881 (2d Cir.), *on further appeal*, 694 F.2d 14 (2d Cir. 1982) .... 4, 5
*United States* v. *Garafola*, 428 F. Supp. 620 (D.N.J. 1977), *aff'd sub nom. United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978) ..... 3
*United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975) ..... 4

*Constitutional and Statutory Provisions:*

U.S. Const. amend. VI ..... 3
Fed. R. Crim. P. 11(e)(1) ..... 1, 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-1051

---

PAUL BENDETTI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and on Motion for Leave to Supplement the Petition for Writ of Certiorari**

---

## REPLY BRIEF FOR PETITIONER

---

1. With respect to the Rule 11(e)(1)(C) plea bargain issue, the Government attempts to distinguish *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973), on the ground that the case "did not impact upon the court's discretion to impose a sentence within the range established by law." (Opp. at 7.) This is a distinction without a difference, since it is both obvious and widely acknowledged that the Government can severely limit a judge's sentencing discretion by the selection or dismissal of charges, as occurred in *Ammidown*. None of the cases cited in the petition or in the brief in opposition adopts the Government's proposed distinction.

The Government further argues: "Even assuming that Congress intended to preserve the core principle of *Ammidown* that requires judicial deference where the interests of the prosecution, not the court, are primarily implicated, that principle would not govern here." (Opp. at 8-9.) But the Government cannot seriously contend that the prosecution does not have a substantial interest in avoiding the expenditure of scarce resources in prosecuting cases where defendants are prepared to plead guilty and to accept a sentence satisfactory to the Government, as well as a substantial interest in encouraging investigative cooperation by entering into agreements like the one at issue here.[1] While the court may have an independent interest in fair and rational sentencing, the trial judge did not base his rejection of the plea on a finding that the proposed sentences were out of line with sentences it had imposed in similar cases. Accordingly, there is no basis for any assertion that the interests of the court were "primarily implicated." The question whether trial judges are authorized by Rule 11 to refuse to accept any Rule 11(e)(1)(C) pleas *as a matter of individual policy* deserves consideration by this Court.

2. The Government argues that petitioner's motion for leave to supplement the petition for writ of certiorari should be denied. The only reason given is that petitioner had "ample opportunity" to include in the original petition the issue raised by his supplement. (Opp. at 10-12). Nowhere does the Government contend that it will be prejudiced in any manner by the grant of petitioner's motion, nor could it so contend. Petitioner's motion for leave to supplement and the supplement itself were filed on February 4, 1983, less than seven weeks after the petition and some two weeks before the initial due date for the brief in opposition that the Court requested the Govern-

---

[1] See the letter to the trial judge from the Government attorney setting forth the considerations supporting the plea agreement, including defendants' cooperation. Pet. at 1a-5a.

ment to file. Moreover, the Government does not dispute petitioner's assertion (Motion at vii; Supp. at 2) that there is no jurisdictional bar to this Court's consideration of the supplement's additional question. Given these unusual circumstances, petitioner's motion for leave to supplement should be granted.

3. With respect to the joint representation question presented by petitioner's supplement, the Government opposes certiorari on the ground that the present case is quite different from *Flanagan* v. *United States*, No. 82-374, *cert. granted*, 51 U.S.L.W. 3508 (U.S. Jan. 10, 1983). (Opp. at 12-15.) That assertion is addressed in petitioner's supplement (at 6-10).

The Government further contends that "petitioner points to no place in the record at which petitioner waived his Sixth Amendment right to conflict-free representation." (Opp. at 13-14.) What the record shows, however, is that the defendants—represented by separate counsel—requested the right to be represented by Mr. Goodman, and the trial judge responded with repeated assertions that defendants "will be far better represented by separate and independent counsel than by Goodman." See Supp. at 8 n.2. If, as the Government states, there is "the absence of an adequate record to further illuminate the waiver question" (Opp. at 15), the trial judge contributed to that absence and, in any event, his statements at the hearing below and in his opinion in *United States* v. *Garafola*, 428 F. Supp. 620, 624 (D.N.J. 1977) (quoted in Supp. at 9), make clear that no more "adequate record" of a valid waiver would have convinced him to permit joint representation. See also *United States* v. *Curcio*, 694 F.2d 14, 27 (2d Cir. 1982), where the court of appeals reversed a trial court finding of no valid waiver of potential conflicts of interest, on a record of inquiry by the trial judge much more complete than occurred here, acknowledging that the trial judge "may have been led into error by trial counsel for the Govern-

ment's having furnished it with a copy of the Third Circuit's opinion in [*Flanagan.*]" [2]

The Government also contends, in a one-sentence assertion without citations, that certiorari should be denied because petitioner does not "suggest that he was prejudiced" by the district court's refusal to allow him and his co-defendants to be jointly represented by Mr. Goodman. (Opp. at 15.) But the circuit court decisions that conflict with *Flanagan* and find error in refusals to permit joint representation do not suggest that "prejudice" must be independently established, rather than presumed. See *United States* v. *Curcio*, 680 F.2d 881 (2d Cir.), *on further appeal*, 694 F.2d 14, 24-25 (2d Cir. 1982); *United States* v. *Cunningham*, 672 F.2d 1064 (2d Cir. 1982); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975); *United States* v. *Agosto*, 675 F.2d 965 (8th Cir. 1982). The right recognized in these cases, founded on the criminal defendant's personal right to manage his defense, is the right to employ counsel of his own choosing. This right is, therefore, substantially equivalent to the right of the accused to waive counsel altogether and represent himself. See *Faretta* v. *California*, 422 U.S. 806 (1975). As Judge Friendly wrote for the Second Circuit in *United States* v. *Curcio*, *supra*:

> "The choice of joint representation, like that of self-representation, is at once strategic and moral. * * *

---

[2] While the Government relies on the fact that "conflicts were conceded to exist by their joint counsel, Oscar Goodman, in October and November 1979, long before trial" (Opp. at 12), the critical hearing took place eight months later, in July 1980. At that hearing, as the Government concedes, one of defendants' separate counsel "represented that Goodman, who was not present at the hearing, was prepared to execute an affidavit stating that he then perceived no conflict in representing all three defendants at trial." (Opp. at 14 n.9; see Supp. at 4.) The trial judge did not rely on the lack of an affidavit or on Goodman's absence in denying joint representation, but on his own view that defendants would be better served by separate counsel.

> To be sure, the defendants' choice of joint representation, like that of self-representation, may sometimes seem woefully foolish to the judge. But the clear thrust of *Faretta* is that the choice is mainly theirs; the judge, much less the prosecutor, is *not* to assume too paternalistic an attitude in protecting the defendant from himself. * * * [T]he defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates. It is the defendants, not the judge or prosecutor, who 'will bear the personal consequences of a conviction.' *Faretta*, 422 U.S. at 834 * * *." 694 F.2d at 25.

If this Court decides in *Flanagan* that the trial judge has wide discretion to deny joint representation even in the presence of a valid waiver of potential conflicts, then the decision below may be unassailable on the joint representation issue; any other result in *Flanagan*, however, is likely to require reversal of the judgment below or at least a remand for further proceedings.

Respectfully submitted,

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
*Counsel for Petitioner*

April 11, 1983